

Robert A. Scherer

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Zia Agricultural Consulting, LLC vs.  
Tyson Foods, Inc.

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEW MEXICO

3 -----  
4 ZIA AGRICULTURAL CONSULTING, LLC,

5 Plaintiff,

6 vs. Case No. 1:20-cv-445-SCY-JHR

7 TYSON FOODS, INC. and

8 TYSON FRESH MEATS, INC.,

9 Defendants.  
10 -----

11 \* \* \*

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13 \* \* \*

14 30(b)(6) VIDEO DEPOSITION TESTIMONY OF  
15 TYSON FOODS, INC. and TYSON FRESH MEATS, INC.

16 TAKEN THROUGH ITS REPRESENTATIVE

17 ROBERT A. SCHERER

18 ON WEDNESDAY, MAY 12, 2021

19 IN DAKOTA DUNES, SOUTH DAKOTA

20 \* \* \*  
21

22 Reported by:

23 Rebecca Klanderud

24 North Dakota

25 Job No. 10081764

EXHIBIT B

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\* \* \*

30(b)(6) Video Deposition Transcript of  
Tyson Foods, Inc. and Tyson Fresh Meats, Inc.,  
taken through its representative ROBERT A.  
SCHERER via remote communication with the  
witness and counsel at the Holiday Inn Express &  
Suites, 885 Cottonwood Lane, Dakota Dunes, South  
Dakota on Wednesday, May 12, 2021, commencing at  
8:37 a.m. before Rebecca L. Klanderud, a  
Certified Shorthand Reporter.

\* \* \*

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1 APPEARANCES:

2 VENABLE, LLP

3 BY: JOHN S. WORDEN, ESQUIRE

4 jsworden@venable.com

5 Suite 3800

6 101 California Street

7 San Francisco, California 94111

8 415.653.3750

9 Counsel for Plaintiff

10

11 MAYER, LLP

12 BY: BRIAN J. FISHER, ESQUIRE

13 bfisher@mayerllp.com

14 Building 3B

15 9400 Holly Avenue Northeast

16 Albuquerque, New Mexico 87122

17 505.595.5175

18 Counsel for Defendants

19 ALSO PRESENT:

20 Lisa Bertrand, Esquire, Tyson

21 Narciso Perez (via telephone)

22 Daniel Gomez, Esquire, Tyson

23 (via telephone)

24 Jason Davis, videographer

25 \* \* \*

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1           Q.     In any way, shape, or form, did you  
2     ever tell anyone from Zia "I do not agree with  
3     the costs" that you received on May 4th and  
4     subsequently three times between then and May of  
5     2019?

6           A.     No, because I did not have a deal for  
7     a cost-plus.

8           Q.     Why do you say you didn't?

9           A.     Because I've always dealt in  
10    inventories and it is -- we purchase the fat  
11    cattle, we pay a premium per head, and  
12    everything is based on the Nebraska weighted  
13    average, just as it is today, as it was the day  
14    I took over this position in 2015.

15          Q.     When was the first time you had any  
16    dealings with Zia?

17          A.     I believe it was in April or May,  
18    when Brad Brandenburg left, and I took over the  
19    job.

20          Q.     In May of what year?

21          A.     2015, I believe.

22          Q.     Where is Brad Brandenburg now?

23          A.     Retired.

24          Q.     Do you know where he lives?

25          A.     Uh, last I heard, he was somewhere

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1     stack of these as we go, then Jason's going to  
2     take it and send it to our court reporter when  
3     the day is done.

4                     MR. WORDEN:   Here's another one just  
5     in case.

6     BY MR. WORDEN:

7             Q.     Mr. Scherer, please look at this  
8     lawsuit, and tell me if you've seen it before.

9             A.     Yes.

10            Q.     All right. Have you seen the  
11    attachments as well?

12            A.     Yes.

13            Q.     When did Tyson begin -- let me phrase  
14    that differently.

15                   Was there a time when Tyson only  
16    bought conventional cattle?

17            A.     I've got to go back in history. We  
18    started EU or NHTC cattle in 1991 in Lexington,  
19    Nebraska. Other than that, we never purchased a  
20    non-conventional animal up until we started our  
21    actual program in 2008.

22            Q.     And generally, why did Tyson expand  
23    into the natural program in 2008?

24            A.     A growing desire by consumers for  
25    clean meat.

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1 Q. Okay. And has that desire at least  
2 in the marketplace continued to grow since then  
3 in your opinion?

4 A. Yes, sir.

5 Q. All right. Do you know when Tyson  
6 started working with Zia with the natural  
7 cattle?

8 A. Not prior to 2015 --

9 Q. Okay.

10 A. -- to my knowledge.

11 Q. I'm sorry.

12 Meaning it wasn't prior to 2015, or  
13 you don't know when it was?

14 A. I do not know when it was.

15 Q. Okay. It was prior to 2015, correct,  
16 as far as you know?

17 A. I have no recollection.

18 Q. Very well.

19 Please turn to page three of Exhibit  
20 1, and please turn to paragraph 19.

21 Mr. Scherer, it's -- um, I think  
22 you're -- you've gone a little too far. Just  
23 the third -- the third page from the  
24 beginning --

25 A. Okay.

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1 Q. -- paragraph 19.

2 Thank you.

3 A. And which number?

4 Q. Paragraph 19.

5 MS. BERTRAND: I think we have two  
6 copies of Exhibit 1 in there. I think that's  
7 what the issue is.

8 MR. FISHER: I think he's talking  
9 about the notice --

10 MR. WORDEN: Yeah. Yes. I'm sorry.  
11 Yes. I'm -- that's right.

12 MR. FISHER: I made that mistake as  
13 well.

14 BY MR. WORDEN:

15 Q. So we're talking about the beginning  
16 of the lawsuit, third page of the lawsuit,  
17 paragraph 19.

18 Do you see that, sir?

19 It starts with: "In or about . . ."

20 A. Yes.

21 Q. Okay. It says: "In or about  
22 December of 2018 and January of 2019, Robert  
23 Scherer, an employee of the Tyson Defendants,  
24 initiated multiple telephone calls with Zia to  
25 discuss a potential list of Premium Cattle and



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1 their cost for purchase during 2019."

2 Is that true statement?

3 A. Yes, sir.

4 Q. It is true that at the December of  
5 2018 and January of 2019 you personally  
6 initiated multiple telephone calls to Zia to  
7 discuss premium cattle, correct?

8 A. Yes.

9 Q. All right. Let's please move to  
10 paragraph 22. It says: "Scherer requested that  
11 Zia identify as many Premium Cattle as possible  
12 for eventual sale to Whole Foods."

13 Is that a true statement?

14 A. To the best of my knowledge.

15 Q. Please go now, and it's a little  
16 confusing.

17 Please go to Exhibit 1 of Exhibit 1.  
18 It's the one you have in front of you but a few  
19 pages back, there's an Exhibit 1.

20 All right. There's a page and if you  
21 look at the top, it says page 2 of 7 of Exhibit  
22 1.

23 Do you see that, sir?

24 Is that the page you're on?

25 A. Yes, sir.

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1 Q. At the bottom of that page, there's  
2 an email from you dated February 4th of 2019.

3 Am I correct so far?

4 A. Yes, sir.

5 Q. All right. It says: "This looks  
6 good get them at a finish yard, asap please."

7 You typed that and sent that on  
8 February 4, 2019, correct?

9 A. Yes, sir.

10 Q. All right. Was there an attachment  
11 to that -- and let's scroll a little bit  
12 further. Please go to Exhibit 2, Exhibit 2 to  
13 Exhibit 1.

14 A. Yep.

15 Q. All right. Now, do you see there's a  
16 chart there, a multicolored chart?

17 Do you have that in front of you?

18 A. Yes, sir.

19 Q. Was that attached to the email that  
20 you responded to saying "looks good" on February  
21 4th of 2019?

22 A. I believe so.

23 Q. All right. So when you said "looks  
24 good," what specifically did you mean looks  
25 good?

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1 A. The inventory itself.

2 Q. All right. So where do I go here to  
3 look to find the part that you were saying looks  
4 good?

5 Which -- which column would I look  
6 at?

7 A. So it would be the orange column, the  
8 Ranch.

9 Q. All right.

10 A. And the projected volumes by month.

11 Q. Is that the pink part, Estimated  
12 Weight at Lean Months or am I looking at the  
13 wrong --

14 A. Correct.

15 Q. Okay. All right. So let's just make  
16 sure we're both reading this correctly.

17 This was -- this was prepared by Zia,  
18 correct?

19 A. Yes, sir.

20 Q. And then there were updates of this  
21 prepared and sent to you in the spring of 2019  
22 as well, correct?

23 A. Yes, sir.

24 Q. All right. So the Ranch, let's start  
25 with the first one.

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1 Did you personally visit Bullinger to  
2 look at theses cattle?

3 A. I did not.

4 Q. Did you send a representative?

5 A. I believe we had a buyer in the area.

6 Q. Okay. How about Happy Pasture?

7 Did you go to that personally?

8 A. I did personally in January of --

9 Q. What --

10 A. -- '19.

11 Q. Excuse me. Go ahead. I'm sorry. Go  
12 ahead, please.

13 I think you -- I interrupted you. I  
14 think your answer was you went there in January  
15 of 2019.

16 Did I hear that correctly?

17 A. Yes, sir.

18 Q. Did you go there with Mr. Perez?

19 A. Yes, sir.

20 Q. All right. How'd the cattle look  
21 when you saw them?

22 A. Light, meaning not of weight.

23 Q. Let's look at the next one, High  
24 Choice.

25 Did you visit that personally?

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1 A. Yes, sir.

2 Q. And did you go there with someone?

3 A. I was with Doug Shepherd on my way  
4 back from New Mexico.

5 Q. Where is High Choice located?

6 A. Scott -- just south of Scott City  
7 Kansas.

8 Q. Okay. Happy Pasture is in Texas,  
9 correct?

10 A. Yes, sir.

11 Q. Where is Bullinger?

12 A. I couldn't tell you.

13 Q. Where is Cuervo Creek?

14 A. New Mexico.

15 Q. Do you recall when you made the visit  
16 to Cuervo Creek at the invitation of Mr.  
17 Barrett?

18 A. Yeah. It would have been, um, tail  
19 end of March or mid-March of 2019.

20 Q. Where in New Mexico is it?

21 A. South of -- southwest of Las Vegas,  
22 New Mexico.

23 Q. All right. Do you know where Valley  
24 View is?

25 A. Yes, sir.

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1 Q. And where is that, sir?

2 A. Sidney, Montana.

3 Q. Is that Rod Prewitt's property?

4 A. Yes, sir, I believe.

5 Q. Did you personally visit there to  
6 look at the cattle listed here?

7 A. No. I had a buyer go there.

8 Q. Did you have any or hear any  
9 complaints when your buyer visited?

10 A. No, sir.

11 Q. No, sir. All right.

12 The visits that we just discussed  
13 either by you personally or by a buyer or a  
14 representative, did those all take place before  
15 the email of February 4th, after, or otherwise?

16 Well, I think you just told me that  
17 Cuervo Creek was in March, so at least that one  
18 was after.

19 Happy Pasture was in January?

20 That's what you think?

21 A. Yes, sir.

22 Q. How about the other ones?

23 Do you have a recollection of when  
24 they were?

25 A. I believe it would have been late

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1 spring.

2 Q. All right. Other than Happy Pasture,  
3 were any of these visits by you or a buyer  
4 before the February 4th, 2019 email?

5 A. Could you restate the question?

6 Q. Yes. So you mentioned that the Happy  
7 Pasture visit was in January of 2019, correct?

8 A. Yes, sir.

9 Q. Were any of the others prior to your  
10 February 4th email other than Happy Pasture?

11 A. No, sir.

12 Q. Please scroll a little bit further.  
13 We're still -- we're still in the main Exhibit  
14 1, but now it's going to be Exhibit 3 to Exhibit  
15 1. And this is an email from Mike Rogers to  
16 Narciso, at least the main email.

17 Do you know who Mike Rogers is?

18 A. Just talked to him on the phone, an  
19 individual that worked for Zia.

20 Q. Okay. Do you recall when you last  
21 talked to him?

22 A. Oh, not specifically --

23 Q. Do you recall --

24 A. -- but we generally talked every  
25 week.

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1 with -- Creek -- Cuervo Creek with?

2 Excuse me.

3 A. Doug Shepherd and I.

4 Q. How do you know Doug Shepherd?

5 A. He's a finish feeder on the natural  
6 side for us.

7 Q. Why did he go to Cuervo Creek with  
8 you?

9 A. Because his interest was looking at  
10 other cattle that he had done prior business  
11 with in the past in New Mexico.

12 Q. Is he a competitor of Zia's?

13 A. Yes.

14 Q. You went with Mr. Shepherd to look at  
15 the Zia cattle at Cuervo Creek?

16 A. No, no. We went to Texas, Kansas,  
17 and New Mexico to look at cattle that Doug had  
18 purchased prior.

19 \* \* \*

20 (Whereupon, Deposition Exhibit 2 was  
21 marked for identification.)

22 \* \* \*

23 BY MR. WORDEN:

24 Q. Here is Exhibit 2, a new exhibit, not  
25 to be confused with Exhibit 2 to Exhibit 1.

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1 BY MR. WORDEN:

2 Q. Did you have a contract with Zia in  
3 early 2019?

4 A. We had a commitment sheet and a  
5 verbal agreement on price per head premium.

6 Q. All right. Did you believe that that  
7 constituted a contract?

8 A. The commitment sheet filled out by  
9 the feed yard would constitute that, yes.

10 Q. All right. Do you know in February  
11 of 2019, were there commitment sheets filled out  
12 by, for example, Happy Pasture?

13 A. No, sir.

14 Q. How about High Choice?

15 A. Yes, sir.

16 Q. How about Valley View?

17 A. I'd be speculating, but there should  
18 have been, yes.

19 Q. How about Bullinger?

20 A. No, sir.

21 Q. Okay. So I'm sorry.

22 I believe you said High Choice did  
23 not have one?

24 A. High Choice did.

25 Q. Which one did not have one?

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1 I -- I asked you which ones had them  
2 and I didn't -- I missed which one you told me  
3 did not have one.

4 A. Bullinger would not because those  
5 were ranch cattle.

6 Q. Okay.

7 A. Happy Texas would have been ranch  
8 cattle. So until they come into the finish yard  
9 of who we do business with, they would not have  
10 a commitment sheet filled out.

11 Q. All right. Um, there's some  
12 objections and -- and legal statements. Let me  
13 move to the middle of the answer at the top of  
14 page 11 of Exhibit 4.

15 In the middle of the page, it says:  
16 "The long-standing course of dealing between  
17 Tyson and Zia was that Zia would offer cattle  
18 for sale, and Tyson would choose which cattle to  
19 purchase based on its business needs."

20 Is that an accurate statement?

21 A. Yes, sir.

22 Q. That's an accurate statement prior to  
23 February of 2019, correct?

24 A. Yes, sir.

25 Q. All right. You never had in any of

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1 those prior dealings though Zia send you a  
2 cost-plus model chart of the type it sent you on  
3 February 4th, 2019, correct?

4 A. Correct.

5 Q. It next says that, ". . .in exchange,  
6 Tyson would pay the Nebraska weighted price plus  
7 a standard premium for each head of cattle it  
8 agreed to purchase."

9 Is that an accurate statement?

10 A. Yes, sir.

11 Q. "In some documents, Zia seemingly  
12 contends that an email attaching an Excel  
13 spreadsheet titled 'cost-plus Model' somehow  
14 constituted an offer that superceded this course  
15 of dealing. The Excel spreadsheet is not a  
16 contract, because it does not contain any of the  
17 key terms that would be expected in a contract."

18 Do you see that, sir?

19 A. I do.

20 Q. The cost-plus chart that we looked at  
21 attached as Exhibit 1 to Exhibit 1, were there  
22 any terms that you thought were missing from  
23 that for you to determine how much Zia would be  
24 paid for the cattle?

25 A. It was never an agreed-upon contract,

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1 period.

2 Q. Were there any terms missing for you  
3 to calculate when you read Exhibit 1 to Exhibit  
4 1 as to how much to pay Zia?

5 MR. FISHER: Objection, asked and  
6 answered.

7 BY MR. WORDEN:

8 Q. Mr. Scherer?

9 A. I would say there is no constituted  
10 offer that I agreed upon.

11 Q. Okay. I know you've said that.  
12 That's not the question.

13 When you looked at the chart that we  
14 went over, Exhibit 1 to Exhibit 1, what term  
15 would you expect to be there that you did not  
16 find in order to determine how much you would  
17 pay Zia?

18 MR. FISHER: Objection, asked and  
19 answered, calls for speculation.

20 BY MR. WORDEN:

21 Q. Are you aware of any term that's  
22 missing for you to determine how much Zia  
23 expected to be paid based on the cost-plus model  
24 it sent you on February 4th of 2019?

25 MR. FISHER: Same objection.

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1 Q. All right. Program, what does that  
2 mean, CER?

3 A. CER went to -- these might have been  
4 into the China run. I would have to go back and  
5 look at the qualification for the program.

6 Q. The next page there's some other  
7 abbreviations.

8 BMA, what does that stand for?

9 A. BMA is -- um, I believe that is a  
10 lean color.

11 Q. Well, then how about CER?

12 A. CER would be another --

13 Q. That's what we just discussed, right?

14 A. Correct.

15 Q. All right. How about CEP?

16 A. That would still be another program,  
17 and I believe these are all codes for China  
18 export.

19 Q. Okay. When you had the meeting with  
20 Mr. Nelson, Mr. Perez, and yourself by telephone  
21 in I think we established it was sometime around  
22 May 25th of 2019, was there a determination made  
23 at that to stop buying from Zia going forward?

24 A. The cattle that we had on the blocks  
25 we said we would honor and finish out.

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1 Q. And then what?

2 A. And then I and Justin discussed it  
3 amongst ourselves and at that point, we were  
4 basically done doing business until we got  
5 information from our counsel in-house that we  
6 could not discriminate, but all of our business  
7 would go through the finish feed yards.

8 Q. Do you know who John Wubbenhorst is?

9 A. John Wubbenhorst?

10 Q. Yes. Did I mispronounce that?

11 A. Yeah. It's W-u-b-b-e-n-h-o-r-s-t.  
12 He's the owner of KCC feed yard,  
13 Minden, Nebraska.

14 Q. All right. Did you go to Cuervo  
15 Creek ranch with him?

16 A. No, sir.

17 Q. Okay. Did you go look at any of  
18 these Zia cattle with him?

19 A. No, sir.

20 Q. Let me do this. I'm going to take  
21 five minutes and scroll through the rest of my  
22 notes and try to wrap it up, all right?

23 A. Sounds good.

24 Q. Thank you.

25 THE VIDEO TECHNICIAN: This is the

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## C E R T I F I C A T I O N

I hereby certify that the proceedings and evidence noted are contained fully and accurately in the notes taken by me in the deposition of the above matter, and that this is a correct transcript of the same.

Further, that if the foregoing pertains to the original transcript of a deposition in a federal case, before completion of the proceedings, review of the transcript [ ] was [ X ] was not requested.

Dated: May 19, 2021



---

Rebecca L. Klanderud

Certified Shorthand Reporter

(The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or supervision of the certifying reporter.)